No. 41357-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Scott Davis,

Appellant.

Clallam County Superior Court Cause No. 09-1-00039-4

The Honorable Judge Kenneth Williams

Appellant's Reply Brief

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I. MR. DAVIS'S CONVICTIONS VIOLATED THE STATE AND FEDERAL CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY.

A. Because of Respondent's concessions, the dispositive issue on appeal is whether the assault and the attempted murder were the same "in fact."

Double jeopardy protects against multiple convictions or punishments for the same offense. *State v. Mutch*, 171 Wash.2d 646, 662, 254 P.3d 803 (2011); *State v. Hall*, 168 Wash.2d 726, 730, 230 P.3d 1048 (2010). The legislature may authorize multiple convictions or punishments, but only within the limits imposed by the double jeopardy clause. *Freeman*, 153 Wash.2d 765, 771 n. 2, 108 P.3d 753 (2005).

In this case, Respondent concedes that the legislature has not expressly authorized separate convictions, and that the two crimes at issue are the same "in law" under the *Blockburger* or "same evidence" test. Brief of Respondent, p. 22 (citing *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932)). The only question on review, therefore, is whether or not the offenses are the same "in fact." Brief of Respondent, p. 24.

Two offenses are the same "in fact" if they arise from the same act or transaction. *State v. Martin*, 149 Wash.App. 689, 699, 205 P.3d 931

(2009). The scope of a transaction depends on the "unit of prosecution" intended by the legislature. This, in turn, is determined by analyzing the statute, reviewing the statute's history, and performing a factual analysis (to see if more than one unit of prosecution is present). *State v. Varnell*, 162 Wash.2d 165, 168, 170 P.3d 24 (2007).

Where the statute is clear, the unit of prosecution must be derived from the plain and unambiguous statutory language. *State v. O'Brien*, 164 Wash.App. 924, 929, 267 P.3d 422 (2011). If the legislature fails to define the unit of prosecution or if its intent is unclear, the rule of lenity requires that the ambiguity be resolved against turning a single transaction into multiple offenses. *Id.*

The unit of prosecution for an assault crime depends on "whether assault is a course-of-conduct offense or a separate-act offense." *United States v. Chipps*, 410 F.3d 438, 449 (8th Cir.2005) (interpreting federal statute).[1] This is an issue of first impression in Washington.

There is no indication that the legislature "sought to punish separately individual acts within an assaultive episode." *Id. at* 448. Instead, the statute under which Mr. Davis was charged provides that a

[1] No published opinion in Washington has examined the unit of prosecution with regard to assault in general, or second-degree assault in particular.

person is guilty of first-degree assault if s/he (with intent to inflict great bodily harm) assaults another with a firearm. RCW 9A.36.011(a).

No explicit reference is made to the unit of prosecution. Nor does any language in the statute suggest that the legislature sought to punish separately the individual acts that take place during a prolonged assault (such as occurred here). *See* RCW 9A.36 *generally*. In fact, the Supreme Court has noted, in *dicta*, that "the assault statute does not define the specific unit of prosecution in terms of each physical act against a victim." *State v. Tili*, 139 Wash.2d 107, 117, 985 P.2d 365 (1999) (distinguishing assault crimes from rape). Accordingly, the rule of lenity requires that the unit of prosecution comprise the entire course of conduct during an assaultive episode. *O'Brien, at* 929.

Nor does anything in the statute's history support a different result. The definition of assault used in Washington is derived from the common law. *See, e.g., State v. Toscano*, ___ Wash. App. ___, ___, ___ P.3d ___ (2012); *State v. Abuan*, 161 Wash.App. 135, 155, 257 P.3d 1 (2011). The definition has not changed significantly over the course of centuries. It does not appear that any Washington court has ever interpreted the definition to allow a separate charge for each act committed during an ongoing course of conduct.

Finally, the facts at trial suggest that Mr. Davis intended an all-out assault on Cortani. Nothing about the assault suggests more than one unit of prosecution under the third *Varnell* factor. *Varnell, at* 168.

All three *Varnell* factors suggest that assault in Washington is a "course-of-conduct offense." *Chipps, at* 449. What this means is that Mr. Davis's assaultive episode constituted a single transaction, during which the attempted murder is alleged to have occurred. Because the attempted murder was part of the assaultive episode, the two offenses are the same "in fact." *Martin, at* 699.

Respondent fails to analyze the unit of prosecution for assault. Brief of Respondent, pp. 24-26. Instead, without citation to authority, Respondent insists that the two offenses were not the same "in fact" because "because Davis used two different weapons, committed two separate assaults (with time to pause and reflect in between) at two different locations." Brief of Respondent, p. 24. Respondent also claims the two offenses were "based on two distinct episodes." Brief of Respondent, pp. 24-25.

Respondent's argument would carry greater weight if an assaultive episode could be divided into separate units of prosecution based on each assaultive act, each weapon used, each pause in the conflict, or each place the defendant positioned himself. But nothing in the language or history

of the statute suggests an assaultive episode can be broken down this way. *See* RCW 9A.36. Respondent provides no authority in favor of this interpretation of the unit of prosecution. Brief of Respondent, pp. 24-26. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wash.App. 751, 779, 150 P.3d 1147 (2007).

The attempted murder was alleged to have occurred during a single assaultive episode. The two crimes were the same "in law" (as Respondent concedes) and "in fact" (as this analysis demonstrates). Accordingly, conviction for both the assault (based on the entire assaultive episode) and the attempted murder (based on the conduct occurring at the end of the episode) violated double jeopardy. *Mutch, at* 662. The assault charge must be vacated and dismissed with prejudice. *Freeman, at* 772.

B. The firearm enhancement imposed in Count II violated double jeopardy under the Fifth and Fourteenth Amendments.

Mr. Davis rests on the argument set forth in the Opening Brief.

II. THE COURT'S ERRONEOUS JURY INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE A SUBSTANTIAL STEP TOWARD COMMISSION OF MURDER.

A trial court must instruct the jury of the state's obligation to prove every element of the charged crime. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wash.2d 422, 429, 894 P.2d 1325 (1995). Any misstatement

that relieves the state of its burden violates due process, requiring reversal unless harmless beyond a reasonable doubt. *State v. Thomas*, 150 Wash.2d 821, 844, 83 P.3d 970 (2004); *State v. Brown*, 147 Wash.2d 330, 341, 58 P.3d 889 (2002).

In this case, the court's instructions did not require the prosecution to prove a substantial step toward commission of murder. Instead of requiring the jury to find that Mr. Davis engaged in "conduct strongly corroborative of the actor's criminal purpose," the court's instructions permitted conviction upon a showing that he engaged in "conduct that strongly indicates a criminal purpose..." *Compare State v. Workman*, 90 Wash.2d 443, 451, 584 P.2d 382 (1978) *with* CP 173.

The instruction dispensed with the requirement of corroboration. Under *Workman,* the substantial step must *corroborate* the intent to commit *first-degree murder*; under the court's instruction, conviction was allowed even if the substantial step only *indicated* intent to inflict a lesser injury (such as grievous or substantial bodily harm). Respondent acknowledges that the instruction "differs... slightly from that [in *Workman*]," but claims that the differing standards are "consistent." Brief of Respondent, p. 28 (citing *State v. Gatalski,* 40 Wash.App. 601, 699 P.2d 804, *review denied,* 104 Wash.2d 1019 (1985)). But the issue in *Gatalski* was whether or not unlawful imprisonment qualified as a lesser

included offense of attempted kidnapping. *Id. at* 612. The *Gatalski* court's *dicta* regarding the "substantial step" instruction has no bearing on this case.

The correct test for evaluating an instruction is not mere consistency with the law. Instead, instructions must make the correct legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009). The instruction here fails this test, because it differs from the definition set forth in *Workman*, and does not make the *Workman* standard manifestly apparent to the average juror. This is so even if the difference is considered slight, as Respondent contends.

Furthermore, the error was not harmless beyond a reasonable doubt. *Thomas*, *at* 844. Mr. Davis's mental state was the primary issue at trial. The instruction relieved the prosecution of its burden to prove conduct corroborating the intent to commit first degree murder, and thus related directly to the core of the dispute.[2]

Under these circumstances, the error cannot be considered trivial, formal, merely academic, or lacking in prejudicial effect. *City of Bellevue*

[2] The fact that Mr. Davis asserted a defense of NGRI did not relieve the prosecution of its obligation to prove a premeditated intent to kill, and conduct strongly corroborating that intent. Respondent's implied argument to the contrary is not well taken. Brief of Respondent, pp. 28-29.

v. Lorang, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). A reasonable juror could have decided that Mr. Davis's conduct was consistent with intent to inflict grievous bodily harm (rather than death), and that it did not "strongly corroborate" the intent to commit first-degree murder. Contrary to Respondent's assertion, the evidence of Mr. Davis's mental state was not so overwhelming it would necessarily lead to a finding of guilt by any reasonable jury.[3] *See State v. Burke,* 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

Mr. Davis's conviction for attempted murder must be reversed. The charge must be remanded for a new trial. *Id.*

III. DEFENSE COUNSEL WAS INEFFECTIVE.

An accused person is deprived of effective assistance when counsel's deficient performance results in prejudice. *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004). In this case, defense counsel was ineffective for failing to offer available evidence of Mr. Davis's good character. CP 26-70, 102-108, 134-140. Respondent's claim—that defense counsel introduced all available character evidence, and that any additional information would have been cumulative—is incorrect. Brief of Respondent, p. 34, 35.

[3] It should be noted that the jury was free to disregard the expert opinion of Dr. Muscatel. *See* CP 165.

There is a reasonable possibility that evidence of good character would have changed the outcome of trial. Had the evidence been introduced, some jurors would likely have developed a reasonable doubt regarding premeditation, or concluded that Mr. Davis was insane at the time of the incident. *Reichenbach, at* 130. Because of this, Mr. Davis was prejudiced by his attorney's failure.

Respondent's argument regarding prejudice is characterized by a myopic focus on the NGRI defense: Respondent assumes that the NGRI plea relieved the prosecution of its obligation to prove premeditation and intent to kill. Brief of Respondent, pp. 34-35. This is incorrect; the prosecution's burden to prove all essential elements remained intact. Furthermore, Respondent incorrectly assumes that Dr. Muscatel's expert opinion provided conclusive proof of Mr. Davis's mental state. Brief of Respondent, pp. 34-35. This too is incorrect; jurors were free to disregard the expert opinion. CP 165.

Defense counsel provided deficient performance, which prejudiced Mr. Davis. Because of this, his convictions must be reversed and the charges remanded for a new trial. *Reichenbach.*

IV. THE COURT'S INSTRUCTIONS AFFIRMATIVELY MISLED THE JURY ABOUT ITS POWER TO ACQUIT UNDER THE STATE CONSTITUTION.

Article I, Sections 21 and 22 guarantee an accused person the right to trial by a jury with the power to acquit in the face of sufficient evidence for conviction. *Hartigan v. Washington Territory*, 1 Wash.Terr. 447, 449 (1874); *Leonard v. Territory*, 2 Wash.Terr. 381, 398-399, 7 P. 872 (Wash.Terr.1885); *see* Appellant's Opening Brief, pp. 28-34. The court's instructions in this case affirmatively misled the jury regarding this power. CP 159-161, 172, 183.

Respondent correctly points out that this argument has been rejected by the court. Brief of Respondent, p. 30 (citing *State v. Brown*, 130 Wash. App. 767, 124 P.3d 663 (2005)). But *Brown* was wrongly decided, and should be reconsidered.

The *Brown* court based its decision on *State v. Meggyesy*, 90 Wash.App. 693, 958 P.2d 319, *review denied* 136 Wash.2d 1028 (1998).[4] In *Meggyesy*, the appellant asked the court to "require an instruction notifying the jury of its power to acquit against the evidence." *Meggyesy*, *at* 699.[5]

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[4] Division II adopted the *Meggyesy* court's analysis in *State v. Bonisisio*, 92 Wash.App. 783, 794, 964 P.2d 1222 (1998).

[5] *See also Bonisisio*, *at* 794 ("We agree with the reasoning in *Meggyesy* that such an instruction is equivalent to notifying the jury of its power to acquit against the evidence...").

Unlike the appellant in *Meggyesy*,[6] Mr. Davis does not ask the court to approve an instruction that affirmatively notifies the jury of its power to acquit. Instead, he argues that jurors should not be affirmatively misled. This question was not addressed in either *Meggyesy* or *Bonisisio;* thus the holding of *Meggyesy* should not govern here. The *Brown* court erroneously found that there was "no meaningful difference" between the two arguments. *Brown, at* 771. *Brown* should be reconsidered, and the issue should be analyzed on its merits.

By affirmatively misleading the jury, the trial court violated Mr. Davis's state constitutional right to a jury trial. Article I, Sections 21 and 22. His convictions must be reversed, and the case remanded for a new trial. *Hartigan, supra; Leonard, supra.*

V. THE TRIAL JUDGE ACTED WELL WITHIN HIS DISCRETION IN FINDING THAT THE OFFENSES COMPRISED THE SAME CRIMINAL CONDUCT.

A sentencing court's "same criminal conduct" determination will only be reversed upon on a clear abuse of discretion or misapplication of the law. *State v. Haddock*, 141 Wash.2d 103, 110, 3 P.3d 733 (2000). In this case, the trial judge acted well within his discretion.

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[6] And the appellant in *Bonisisio.*

Respondent apparently concedes that the two offenses involved the same victim and occurred at the same time, even though they were not necessarily simultaneous. Brief of Respondent, pp. 38-43.[7] Respondent's arguments focus on the "same place" and "same criminal intent" elements of the analysis. Brief of Respondent, pp. 38-43.

Respondent's "same place" argument is flawed, because it is not based on the appropriate analytical framework. Respondent fails to cite *Stockmyer,* which is the only published opinion to wrestle with the "same place" prong of the same criminal conduct determination (not to mention the obvious authority in support of the state's position). *State v. Stockmyer*, 136 Wash.App. 212, 219, 148 P.3d 1077 (2006). In *Stockmyer,* the court upheld the trial court's finding that firearms stored in different rooms in the defendant's house could give rise to crimes that scored separately. *Id. at* 219-220. In reaching this result, the court analyzed the evidence in light of public policy regarding the danger posed by firearms and concluded that the trial judge had acted within his discretion. *Id.*

[7] Respondent argues—somewhat unclearly—that Mr. Davis's offenses were not "the *same crime*" and thus could not score as same criminal conduct. Brief of Respondent, pp. 38 (citing *State v. Porter,* 133 Wash.2d 177, 942 P.2d 974 (1997)). If Respondent's argument is that multiple offenses must be simultaneous unless they're violations of the same statute, then Respondent is incorrect. *Porter* imposed no such restriction when it held that simultaneity is not required in order for offenses to qualify as the same criminal conduct. *See Porter, at* 183 (citing *State v. Vike*, 125 Wash.2d 407, 885 P.2d 824 (1994)).

There is no reason to overturn the trial court's "same place" finding, and Respondent provides no analysis of the type outlined in *Stockmyer*. Brief of Respondent, p. 38. The court was within its discretion when it considered the location of each offense in the context of the other evidence introduced at trial and found, under the circumstances, that both crimes occurred at the "same place." Nor is there any public policy basis for concluding otherwise. The trial court's "same place" finding should be upheld as a legitimate exercise of discretion.

Respondent's "same criminal intent" analysis is similarly flawed. The proper standard for determining same criminal intent is not the mental state required for conviction, but rather the defendant's overall criminal purpose. *State v. Vike*, 125 Wash.2d 407, 411, 885 P.2d 824 (1994). Part of the analysis will often include the related issues of whether one crime furthered the other. *State v. Garza-Villarreal*, 123 Wash.2d 42, 46, 864 P.2d 1378 (1993).

Thus, for example, attempted theft of a firearm and third-degree assault can score as the same criminal conduct, where the defendant assaulted an officer while struggling to get his gun. *State v. Miller*, 92 Wash.App. 693, 964 P.2d 1196 (1998). Similarly, second-degree assault and kidnapping comprise the same criminal conduct where "[the defendant's] objective intent in committing the kidnapping was to abduct

[the victim] by the use or threatened use of the gun and... his objective intent in participating in the second degree assault was to persuade [the victim], by the use of fear, to not resist the abduction." *State v. Taylor*, 90 Wash.App. 312, 321-322, 950 P.2d 526 (1998). *See also State v. Dunaway*, 109 Wash.2d 207, 217, 743 P.2d 1237 (1987) (kidnapping and robbery comprise the same criminal conduct where the kidnapping occurred in furtherance of the robbery).

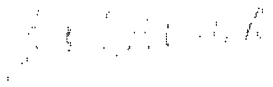
In this case, Mr. Davis's overall criminal intent, viewed objectively, was to shoot Deputy Cortani. Both crimes furthered this purpose; thus both were committed with the "same criminal intent" under RCW 9.94A.589(1)(a). The trial court judge was well within his discretion when he found that the two crimes comprised the same criminal conduct. Accordingly, Respondent's cross appeal must be denied.

CONCLUSION

Mr. Davis's convictions must be reversed. The assault charge must be dismissed with prejudice and the attempted murder charge remanded for a new trial.

Respectfully submitted on March 17, 2012,

BACKLUND AND MISTRY



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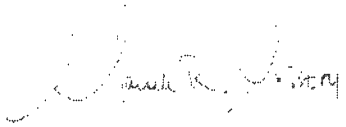

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I certify that on today's date:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 17, 2012.

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